Thivasalim a/l Abdul Majeed v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–213–07 OF 2011
BALIA YUSOF WAHI, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
4 OCTOBER 2013

B

C

Criminal Law — Dangerous drugs — Trafficking — Accused convicted for drug trafficking and sentenced to death — Appeal against decision of High Court — Whether accused had knowledge and possession of drugs recovered — Whether there was gap in prosecution's case

D

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for drug trafficking and sentenced to death — Drugs found in car boot along with clothing bearing DNA of unknown male — Whether recovery of clothing evaluated by trial judge — Whether possibility of other individuals as not having access to drugs excluded — Whether prosecution had proven only accused had custody to car — Whether conviction safe — Dangerous Drugs Act 1952 s 39B(1)(a)

E

Evidence — Adverse inference — Failure to call material witness — Drugs found in car boot — Allegation that car was rented by another person — Whether called as witness — Whether non-calling detrimental to prosecution's case — Evidence Act 1950 s 114(g)

F

G

In the present appeal, the appellant was charged for drug trafficking, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Acting on information of a drug trafficking activity, SP5 and a party of police, kept an observation at the suspected place. A car was seen with only the appellant as the occupant. SP5 and his men tailed the car until it stopped in front of a house ('the said house'). As soon as the appellant opened the door, SP5 rushed towards the car and arrested the appellant. A body search on the appellant revealed nothing incriminating but from the car boot, SP5 recovered three travelling bags, all of which contained 53, 30 and 54 plastic packages, respectively. Inside the plastic packages were substances later confirmed by the chemist to be a mixture of heroin and monoacetylmorphine weighing 4,122g. At the end of the prosecution's case, the judicial commissioner ('JC') found that the appellant had possession of the car and of the drugs. The appellant's defence was that he had no knowledge of the three travelling bags in the car and further argued that one Azli who had rented the car, was responsible. The JC found the

H

I

defence to be a mere denial and the appellant was thus found guilty, convicted and sentenced to death. In the present appeal, the appellant submitted that the JC erred in facts and in law when, inter alia, Her Ladyship failed to invoke adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call Azli; and that Her Ladyship failed to realise that, based on the circumstances of the case, this was a case of possession and not trafficking.

Held, allowing the appeal:

(1) What had escaped the evaluation of the learned JC was the recovery of a sweater and a t-shirt on which there existed the DNA of an unknown male. It could not be denied that the sweater and the t-shirt were proximate to the drugs. The presence of the DNA on the sweater and the t-shirt established that at least two other individuals were connected to the car. It was the duty of the prosecution to exclude the possibility of other individuals as not having access to the car and/or have anything to do with the drugs and it was important for the JC to ask herself whether anybody else had used the car before the arrest of the appellant. The JC had not directed her mind to this aspect where it was imperative for the prosecution to exclude the possibility that other individuals could not have had custody or control of the car in order to prove possession (see paras 21–22).

(2) The evidence of the chemist and her report clearly showed that the DNA profile on the sweater and t-shirt originated from different sources where the appellant was excluded as being the contributor of the DNA profile. Thus, quite apart from the fact that the appellant was alone in the car at the material time, there was other evidence before the court ie the DNA evidence which exculpated the appellant and incriminated other individuals. In failing to consider this, the JC had not undertaken the maximum evaluation of the evidence (see para 23).

(3) Although Azli was not with the appellant when the appellant was arrested, given the fact that it was Azli who rented the car; given that the possibility of Azli having the control and custody of the car had not been excluded and given that there are other individuals who contributed to the DNA profile on the sweater and the t-shirt which were so proximate to the drugs, the production of Azli was indeed an issue in this case. Azli could have given an explanation as to the existence of the DNA profile on the sweater and the t-shirt and could have closed the gap in the prosecution's case. There was no evidence led as to whether efforts were made to locate Azli. Without any efforts made to call Azli on his handphone number and to locate Azli at other available addresses, it could not be said that Azli could not be found (see paras 31–32).

(4) The JC erred in failing to consider the possibility of other individuals

having access to the car. Had the JC asked herself the right question, Her Ladyship would have found that there was a gap in the prosecution's case and that possession of the drugs had not been proved. The conviction and sentence by the High Court was set aside and the appellant was acquitted and discharged (see para 34).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu telah didakwa dengan kesalahan mengedar dadah, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('DDA'). Bertindak atas maklumat daripada aktiviti pengedaran dadah, SP5 dan pihak polis, membuat pemerhatian di tempat yang disyaki. Sebuah kereta dilihat dengan hanya perayu sebagai penumpang. SP5 dan anggotanya mengekori kereta tersebut sehingga ia berhenti di hadapan sebuah rumah ('rumah tersebut'). Sebaik sahaja perayu membuka pintu, SP5 bergegas ke arah kereta itu dan menahan perayu. Carian badan ke atas perayu tidak mendedahkan apa-apa yang menunjukkan dia bersalah tetapi dari but kereta, SP5 menemui tiga beg perjalanan, masing-masing mengandungi 53, 30 dan 54 pakej plastik. Bahan di dalam pakej plastik kemudiannya disahkan oleh ahli kimia merupakan campuran heroin dan monoacetylmorphine seberat 4,122g. Pada akhir kes pendakwaan, pesuruhjaya kehakiman ('PK') mendapati bahawa perayu mempunyai milikan terhadap kereta dan dadah. Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan daripada tiga beg perjalanan, di dalam kereta dan terus berhujah bahawa Azli yang telah menyewa kereta, bertanggungjawab. PK mendapati pembelaan adalah penafian semata-mata dan perayu dengan itu didapati bersalah, disabitkan kesalahan dan dijatuhkan dihukum mati. Dalam rayuan ini, perayu berhujah bahawa PK terkhilaf dalam fakta dan undang-undang apabila, antara lain, dia gagal untuk menggunakan inferens di bawah s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan kerana gagal memanggil Azli dan dia gagal untuk menyedari bahawa, berdasarkan hal keadaan kes itu, ini adalah satu kes pemilikan dan bukan pengedaran.

Diputuskan, membenarkan rayuan:

(1) Apa yang terlepas daripada penilaian PK yang bijaksana adalah penemuan baju sejuk dan t-shirt yang mempunyai DNA lelaki yang tidak diketahui. Ia tidak dapat dinafikan bahawa baju sejuk dan t-shirt adalah berkaitan langsung kepada dadah. Kehadiran DNA pada baju sejuk dan t-shirt menetapkan bahawa sekurang-kurangnya dua individu lain dikaitkan dengan kereta tersebut. Ia adalah kewajipan pendakwaan untuk menolak kemungkinan individu lain yang tidak mempunyai akses kepada kereta dan/atau mempunyai apa-apa kaitan dengan dadah dan ia adalah penting untuk PK bertanya kepada dirinya sama ada orang lain telah menggunakan kereta sebelum penangkapan perayu. PK tidak mengarahkan fikirannya kepada aspek ini yang mana ia adalah penting

bagi pihak pendakwa menolak kemungkinan bahawa individu lain tidak mungkin mempunyai jagaan atau kawalan kereta bagi membuktikan pemilikan (lihat perenggan 21–22).

(2) Keterangan ahli kimia dan laporan dengan jelas menunjukkan bahawa profil DNA pada baju sejuk dan t-shirt berasal dari sumber-sumber yang berbeza yang mana perayu tidak termasuk sebagai penyumbang profil DNA. Oleh itu, selain daripada fakta bahawa hanya perayu semata-mata di dalam kereta pada masa tersebut, terdapat keterangan lain di hadapan mahkamah iaitu bukti DNA yang membebaskan perayu dan menunjukkan kesalahan individu lain. Kegagalan untuk mempertimbangkan perkara ini, PK tidak membuat penilaian maksimum terhadap keterangan (lihat perenggan 23).

(3) Walaupun Azli tidak bersama perayu apabila perayu ditangkap, memandangkan ia adalah Azli yang menyewa kereta; memandangkan kemungkinan Azli mempunyai kawalan dan jagaan ke atas kereta itu tidak dikecualikan dan memandangkan terdapat individu lain yang menyumbang kepada profil DNA pada baju sejuk dan t-shirt yang begitu berkaitan langsung kepada dadah, kehadiran Azli sememangnya satu isu dalam kes ini. Azli boleh memberi penjelasan tentang kewujudan profil DNA pada baju sejuk dan t-shirt dan boleh menutup jurang dalam kes pendakwaan. Tidak ada bukti yang menunjukkan sama ada sebarang usaha-usaha dilakukan untuk mengesan Azli. Tanpa apa-apa usaha dibuat untuk memanggil Azli pada nombor telefon bimbitnya dan untuk mencari Azli di alamat lain yang ada, ia tidak boleh dikatakan bahawa Azli tidak dapat ditemui (lihat perenggan 31–32).

(4) PK terkhilaf apabila gagal mempertimbangkan kemungkinan individu lain yang mempunyai akses kepada kereta. Sekiranya PK bertanya kepada dirinya soalan yang betul, dia akan mendapati bahawa terdapat jurang dalam kes pendakwaan dan pemilikan dadah tidak dibuktikan. Sabitan dan hukuman oleh Mahkamah Tinggi telah diketepikan dan perayu dilepaskan dan dibebaskan (lihat perenggan 34).]

Notes

For cases on failure to call material witness, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 224–246.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Abdullah Zawawibin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113, FC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)

PP v Jitweer Singh a/l Ojagar Singh (unreported), FC (refd)

Legislation referred to

Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)
Evidence Act 1950 ss 32, 114(g)

Appeal from: Criminal No 45–178 of 2007 (High Court, Shah Alam)

Hisyam Teh Poh Teik bin Abdullah (Teh Poh Teik & Co) for the appellant.
Tetralina bt Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act.

[2] The case for the prosecution is as follows. Acting on information received on drug trafficking activity, on 27 July 2007 at about 7.30am C/Insp Balasubramaniam a/l Rajoo (SP5) and his men went to the targeted spot at Petronas petrol station at Batu 7 1/2 Jalan Cheras-Kajang, Selangor. After keeping observation for about 1 1/2 hours, SP5 saw a car bearing registration No WJC 8809 passed by. The driver was the only occupant in the said car.

[3] SP5 and his men tailed the car until it stopped in front of a house at Jalan Penggawa 1/2, Bandar Mahkota, Cheras. As soon as the driver ('the appellant') opened the door, SP5 rushed towards the car and arrested the appellant. The appellant put up a struggle. Nothing incriminating was found on the body of the appellant but from the boot of the car, SP5 recovered three travelling bags. The first bag (exh P9), the second bag (exh P14) and the third big (exh P19) contained 53, 30 and 54 plastic packages respectively. The bags and the plastic packages were seized by SP5. The substances in the plastic packages were later confirmed to be a mixture of heroin and monoacethylmorphine with a quantity of 4,122.2g.

[4] The car was rented by one Azli bin Mior Basri. SP12 from AMM Services testified that Azli who was his regular customer had signed the agreement to rent the car on 20 July 2007 and that Azli had paid the rental. The rental was initially for three days but Azli had called SP12 to extend the hiring of the car. On 22 July 2007 the car had broken down and Azli had telephoned SP12 to inform about the car and requested that it be repaired. After the car was taken to the workshop for repair, the appellant had persistently called asking for the car.

[5] Chief Inspector Zainol Hisham bin Abu (SP9) the officer who examined the car recovered bottles of mineral water from the front passenger seat and from the back seat, SP9 recovered a jacket and a pair of slippers of size 10. From the boot of the car, SP9 recovered:

(a) a pair of shoes size 8;

(b) a blue coloured sweater;

(c) a blue coloured t-shirt;

(d) a blue shirt of size L; and

(e) a dark blue blanket.

[6] The items recovered were handed to the investigating officer (SP14) who then sent them to the Chemist Department. The chemist (SP10) who conducted the DNA analysis came to the following findings:

(a) one of the bottles of mineral water carries the DNA of the appellant;

(b) a partial male DNA profile was derived from the t-shirt (exh P66) which did not match the DNA of the appellant; and

(c) the DNA profile derived from the blue sweater (exh P64) consisted of a mixture DNA types from at least two individuals. One is consistent with the partial male DNA profile derived from the t-shirt. The appellant was excluded as being the other contributor of this mixed DNA profile.

[7] At the close of the prosecution's case, the learned judicial commissioner found that the appellant had possession of the car and of the drugs on possession of the car, the learned judicial commissioner found:

> 28 … Walaupun kereta disewa oleh Azli fakta menunjukkan pada masa yang relevan WJC 8809 berada di bawah jagaan dan kawalan Tertuduh semata-mata. Siasatan yang dijalankan oleh SP14 juga menunjukkan tidak ada orang lain terlibat dengan pengedaran dadah ini kecuali Tertuduh. Tertuduh telah menunjukkan perilaku seorang yang berkepentingan terhadap WJC 8809. Mahkamah berpandangan walaupun WJC 8809 disewa oleh Azli, penyewa sebenar ialah Tertuduh. Secara fizikal WJC 8809 berada dengan Tertuduh dan bukan Azli pada hari, waktu dan di tempat pengedaran sebagaimana tercatit pada pertuduhan.

[8] On possession of the drugs, the learned judicial commissioner made the following findings:

> 29 P9, P14 and P19 merupakan beg pakaian yang besar yang boleh dilihat dengan mudah oleh sesiapa sahaja. P9, P14 dan P19 ditemui oleh SP5 dalam keadaan hanya ditutup dengan zipnya ditarik sahaja dan tidak dikunci. Melihat cara barang kes disimpan, saiznya dan juga jumlah beg yang berada dalam WJC 8809 yang berada

di bawah kawalan sepenuhnya Tertuduh pada hari, waktu dan di tempat yang diperihalkan dalam pertuduhan inferens yang kuat boleh dibuat, Tertuduh mempunyai pengetahuan mengenai apa sebenarnya yang berada dalam P9, P14 dan P19 yang berada dalam WJC 8809 yang dipandunya.

30 Sama ada kenderaan itu didaftar atas nama Tertuduh atau tidak tidak menjadi isu dalam kes ini kerana isu ini tidak relevan. Perkara yang hendak dilihat oleh Mahkamah ialah sama ada Tertuduh mempunyai kawalan dan jagaan terhadap P9, 14 dan 19 berserta kandungannya yang berada dalam but kenderaan tersebut. Seperkara lagi pada masa tangkapan Tertuduh berada berseorangan dalam kenderaan dan tidak terdapat orang lain dalam kenderaan tersebut selain daripada Tertuduh.

[9] The learned judicial commissioner made the following finding on the appellant's DNA:

31 Seperkara lagi dua botol air minuman yang ditemui pada tempat duduk penumpang di bahagian hadapan bersebelahan dengan pemandu (Tertuduh) telah disahkan oleh SP10 iaitu Ahli Kimia (DNA) mengandungi DNA Tertuduh dan tiada DNA pihak lain ditemui dalam kenderaan tersebut.

[10] The conduct of the appellant was also considered by the learned judicial commissioner as follows:

32 SP5 juga telah menyatakan Tertuduh kelihatan takut dan cemas semasa SP5 menjalankan pemeriksaan terhadap kenderaan tersebut. Menurut SP6 pula berlaku pergelutan semasa SP5 hendak menggari tertuduh. Tertuduh dikatakan dalam ketakutan, meronta-ronta dan cuba mengelak daripada digari dan gagal memberi kerjasama kepada SP5. Walaupun telah disoal balas secara bertubi-tubi SP6 tetap konsisten dalam memberi keterangan berhubung perilaku Tertuduh pada masa tangkapan yang membawa inferens perilaku yang konsisten dengan pengetahuan bahawa P9, P14 dan P19 mengandungi dadah iaitu bahan yang menyalahi undang-undang.

[11] On the basis of proximity of the drugs and the appellant, the learned judicial commissioner found that:

40 Berdasarkan perilaku Tertuduh, dadah yang berada berhampiran dengan Tertuduh, fakta tiada orang lain dalam kenderaan kecuali Tertuduh dan kegagalan Tertuduh memberi penjelasan tentang kewujudan P9, P14 dan P19 berserta kandungannya dan perkara-perkara di sekeliling tangkapan Tertuduh secara bersekali Mahkamah membuat inferens Tertuduh sedang mengangkut dadah berbahaya tersebut dalam WJC 8809 dan Tertuduh sedar dan tahu apa yang berada dalam P9, P14 dan P19 sebenarnya ialah dadah berbahaya sebagaimana yang ditakrif dalam Seksyen 2 Akta dan juga Jadual Pertama Akta …

[12] The defence of the appellant was that he had no knowledge of the

presence of the three bags in the car which contained the drugs. The appellant explained the circumstances under which he drove the car. We do not wish to set out his explanation in full, suffice to state that Azli (whom the appellant referred to as 'Ali') was said to be responsible for the car and that he was driving the car to Ali's house on the instruction of Ali. The learned judicial commissioner found the defence to be a mere denial and that the appellant was not a credible witness.

[13] The appellant was thus found guilty for trafficking in dangerous drugs. He was convicted and sentenced to death. Before us is the appeal against the said conviction and sentence. The petition of appeal sets out the following reasons for the appeal:

1 The Learned judicial commissioner erred in facts and in law when Her Ladyship convicted the Appellant of a trafficking charge and sentenced him to death.

2 The Learned judicial commissioner misdirected herself when Her Ladyship, to the prejudice of the Appellant made, two different findings at the close of the Prosecution's case. This could be seen from her written judgment and her decision at the close of the Prosecution's case.

3 The Learned judicial commissioner erred in facts and in law when Her Ladyship failed to realise that:

(a) adverse inference under s 114(g) of the Evidence Act could be invoked against the Prosecution for failing to call Azli Mior Basri;

(b) without Azli Mior Basri the Prosecution could not be said to have proven possession;

(c) without Azli Mior Basri being made available to the Appellant defence had been hampered.

4 The Learned judicial commissioner erred in facts and in law when Her Ladyship failed to consider the appellant's defence. Her Ladyship erred when she held that the evidence of the appellant's sister (SD2) had to be accepted with care as she was present in open court during the trial and that she was an interested witness

5 The Learned judicial commissioner erred in facts and in law when Her Ladyship failed to realise that, under the circumstances of the case, this is a case of possession and not trafficking.

[14] The appellant had an additional ground of appeal which reads 'That the learned trial judge misdirected herself when she held that the appellant had failed to rebut the trafficking presumption under s 37(da) when the said presumption was never invoked'. Learned counsel for the appellant did not pursue ground 3(a) of the petition of appeal.

WHETHER POSSESSION OF THE DRUGS HAD BEEN PROVED

[15] Although there are six grounds in the petition of appeal, having read the written submissions and having heard the oral submissions, we find that central to the appeal was the issue of Azli, the person who had rented WJC 8809. Azli did not give evidence in court but his statement was recorded under s 112 of the Criminal Procedure Code.

[16] Learned counsel for the appellant conceded that the appellant was persistent in calling for the car when it broke down and when it was under repair and that the appellant was alone in the car when he was arrested. However it was the submission of learned counsel that it cannot be disputed that there is a close nexus between Azli and the car and that Azli was an important witness. Relying on among others, the case of *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 4 CLJ 113, learned counsel submitted that it is the duty of the prosecution to exclude the possibility that others could not have had access to the car. On the ground of the failure to call Azli and the insufficient evaluation by the learned judicial commissioner of the role played by Azli, it was argued by learned counsel that there certainly is a gap in the case for the prosecution and that the element of possession was not proven.

[17] In *Ibrahim Mohamad & Anor*, acting on a tip-off, the police apprehended the accused persons who at the material time were in a vehicle. From the back seat rest of the vehicle, 40 transparent plastic packages of cannabis were recovered. The accused persons were tried, convicted and sentenced to death for trafficking in 38,499.68g cannabis. The only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody and control of the drugs was:

(a) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of the arrest; and

(b) that the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah about six months prior to the date of his arrest in the present case.

[18] The accused appealed to the Court of Appeal. The appeal was dismissed. On appeal to the Federal Court, the Federal Court allowed the appeal. The conviction on the charge of trafficking was substituted with one of possession. The gist of the decision of the Federal Court is that:

(a) the prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of the arrest;

(b) even if the learned trial judge was correct in deciding that both the

A accused were in custody and control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them; and

B (c) whilst the conduct of the accused in fleeing the scene may be a relevant factor to be considered, such a conduct must be weighed against the circumstances of the case.

[19] The learned DPP attempted to distinguish the facts of the instant case C with *Ibrahim Mohamad*. It was her submission that in the instant case when the police tailed the car, only the appellant was in the car. It was thus the submission of the prosecution that there was no error by the learned judicial commissioner in coming to her decision that the appellant was in control and custody of the car and had possession of the drugs based on the following facts:

D (a) it was the appellant who took delivery of the car rented by Azli;

(b) it was the appellant who had angrily pressured SP11 and SP12 for the car when it was under repair;

(c) it was the appellant who took delivery of the car upon being repaired; and E

(d) when the appellant was arrested, there was no one else in the said car.

[20] We are mindful of the fact that in this case the police had been tailing the car with only the appellant inside it and that no one else was seen in the car. F We are also mindful of the fact that the appellant had resisted the arrest and that the appellant's conduct is a relevant consideration to infer knowledge of the drugs (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717).

G **[21]** However, what had escaped the evaluation of the learned judicial commissioner is the recovery of a sweater and a t-shirt on which there exist the DNA of an unknown male. SP10 had given evidence that the DNA profile derived from the sweater and the t-shirt did not match the DNA of the appellant.

H

[22] It cannot be denied that the sweater (P64) and the t-shirt (P66) were proximate to the drugs. The presence of the DNA on the sweater and the t-shirt recovered from the boot of the car established that at least two other individuals were connected to the car. It is the duty of the prosecution to exclude the I possibility of other individuals as not having access to the car and/or have anything to do with the drugs and it is important for the learned judicial commissioner to ask herself whether anybody else had used the car before the arrest of the appellant. The learned judicial commissioner had not directed her mind to this aspect where it is imperative for the prosecution to exclude the

possibility that other individuals could not have had custody or control of the car in order to prove possession (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1).

[23] The learned judicial commissioner at para 31 of the grounds of judgment states that 'tiada DNA pihak lain ditemui dalam kenderaan tersebut'. With respect, we find the above finding by the learned judicial commissioner erroneous. The evidence of the chemist and her report clearly shows that the DNA profile on the sweater and t-shirt originated from different sources where the appellant was excluded as being the contributor of the DNA profile. Thus, quite apart from the fact that the appellant was alone in the car at the material time, there was other evidence before the court ie the DNA evidence which exculpates the appellant and incriminates other individuals. In failing to consider this, the learned judicial commissioner had not undertaken the maximum evaluation of the evidence.

ADMISSIBILITY OF THE SECTION 112 STATEMENT

[24] The prosecution had sought to admit s 112 statement made by Azli (exh P101) under s 32 of the Evidence Act 1950. In essence, s 32 provides for the admission of statements made by a person who cannot be found or whose attendance cannot be procured without unreasonable delay or expense. The move by the prosecution to admit exh P101 was objected by learned counsel for the defence on the ground that the conditions for the application of s 32 had not been complied with.

[25] The learned judicial commissioner ruled 'Tak apa saya kekalkan dulu nanti saya buat keputusan kemudian …' Despite having reserved the ruling on the objection by learned counsel for the appellant on the admissibility of s 112 statement, the learned judicial commissioner unfortunately failed to make any such ruling either in the course of the trial or in the grounds of judgment.

[26] It was submitted by the learned DPP that although exh P101 was admitted, there was no error on the part of the learned judicial commissioner as Her Ladyship did not rely on s 112 statement in finding that the prosecution had proven their case. Further, the learned DPP highlighted that this issue was not stated in the petition of appeal. In response, Encik Hisyam Teh Poh Teik submitted that para 3 of the petition of appeal is wide enough to cover the issue of admissibility of s 112 statement.

[27] We agree with Encik Hisyam that para 3 of the petition of appeal covers the point taken by the appellant on the admissibility of s 112 statement. The issue of admissibility of exh P101 is directly connected to Azli. The ground put

forth by the appellant in para 3 of the petition of appeal is that without Azli, the prosecution could not be said to have proven possession and that without Azli being made available, the appellant's defence had been hampered. In any event, it is no longer an inflexible rule that it is mandatory that grounds not itemised in the petition of appeal must be disregarded without any discretion to admit it (see Mahkamah Persekutuan Rayuan Jenayah No 05-286-2011(B) Antara *Public Prosecutor v Jitweer Singh a/l Ojagar Singh*).

[28] The evidence of SP15 shows that several attempts were made to locate Azli. For ease of reference, the evidence is reproduced below:

> Pada 10 Disember 2010 saya bersama DSM Abd Rahman telah pergi ke alamat No 24 Jalan Penggawa 7/2, Bandar Mahkota Cheras dan dapati di alamat tersebut dihuni oleh seorang perempuan India.
>
> …
>
> Pada 13 Disember 2010 saya telah buat permohonan ke Jabatan Pendaftaran Negara bagi mendapatkan family tree ke atas penama Azli bin Mior Basri dan saya terima senarai nama ahli keluarga penama. … Pada 15 Disember saya ada hantar satu semboyan kepada KBSJND Kuantan, Pahang bagi mengesan penama Haryati binti Jamil iaitu isteri kepada penama di alamat B28, Kampung Paya Bunga, Kuantan, Pahang.

[29] SP15 further testified:

> Pada 16 Disember 2010 saya bersama L/Koperal Zamzul pergi ke alamat iaitu adik lelaki penama di alamat C-2-14, PPR Taman Wahyu 2, Jalan Sibu Off Jalan Ipoh, Kuala Lumpur. Tiba di alamat tersebut saya dapati tiada penama Azrul yang tinggal di sana. Azrul merupakan adik kepada Azli dan saya telah temuramah penghuni rumah iaitu Andre Azhar bin Abdul Azli.
>
> …
>
> …
>
> Pada 17 Disember 2010 bersama L/Koperal Zamzul telah pergi ke alamat Lot 9, Jalan Dewan, KM 10.8 Kampung Simpang 3, Gombak … ini alamat adik perempuan Azli bin Mior Basri … Setibanya di alamat tersebut … Mazlin beritahu tidak tahu tempat tinggal abangnya serta tidak mempunyai nombor telefon abangnya …
>
> …
>
> Pada 27 Disember 2010 saya ada menghubungi Wartawan bagi akhbar Berita Harian, akhbar Sinar, akhbar Kosmo dan Utusan Malaysia untuk minta bantuan buat hebahan media bagi mengesan penama Azli bin Mior Basri.
>
> …
>
> Pada 30 Disember 2010 di muka surat 14, akhbar Kosmo terdapat hebahan mengenai penama ini … Saya ada membuat permohonan kepada Jabatan Pengangkutan Jalan bagi mendapatkan alamat terkini penama dan saya ada serahkan satu salinan alamat penama.

[30] SP15's testimony on the efforts made to locate Azli goes to show that Azli is an important witness The finding of the learned judicial commissioner on Azli is as follows:

> 43 Atas penghujahan peguam bela berhubung isu kegagalan pihak pendakwaan mengemukakan Azli sebagai saksi dan supaya Mahkamah membuat anggapan bertentangan menurut seksyen 114(g) Akta Keterangan 1950, Mahkamah berpuashati percubaan yang munasabah telah dibuat oleh pihak pendakwaan bagi mengesan Azli namun Azli tidak berjaya dikesan oleh SP15. Dalam apa-apa keadaan Tertuduh ditangkap bersendirian dalam WJC 8809 dengan dadah yang menyalahi undang-undang. Azli tidak berada bersama-sama Tertuduh semasa Tertuduh ditangkap. Oleh yang demikian kegagalan memanggil Azli tidak menjadi isu dalam kes ini.

[31] Although Azli was not with the appellant when the appellant was arrested, given the fact that it was Azli who rented the car; given that the possibility of Azli having the control and custody of the car had not been excluded and given that there are other individuals who contributed to the DNA profile on the sweater and the t-shirt which were so proximate to the drugs, it is our judgment that the production of Azli is indeed an issue in this case. Azli could have given an explanation as to the existence of the DNA profile on the sweater and the t-shirt and could have closed the gap in the prosecution's case.

[32] It must have been upon realising the importance of the evidence of Azli that the prosecution took recourse to s 32 of the Evidence Act 1950. In this regard, there was no evidence led as to whether efforts were made to locate Azli at the address stated in his s 112 statement ie No 7-16-08, Flat Sri Selangor, Jalan San Peng, Kuala Lumpur. We noted that the handphone number of Azli was also stated in his statement. There was no evidence as to whether SP15 did make any attempts to contact Azli through the said handphone number. The family tree of Azli disclosed the address of his mother at No 2, Kedai Kopi Kampung Manggis, Slim River, Perak. Again there was no evidence that SP15 had gone to this address to locate Azli. Insofar as the address at Revena Villa, Jalan Danau Putra 7, Danau Putra is concerned, there was only a single visit made to the said address There was no follow up visit thereafter to ascertain if indeed the premise was not occupied as testified by SP15.

[33] Without any efforts made to call Azli on his handphone number and to locate Azli at other available addresses mentioned above, it could not be said that Azli cannot be found. There is therefore much force in the submission of learned counsel for the appellant that the conditions for exh P101 to be admitted under s 32 of the Evidence Act 1950 had not been met. It is thus our view that the learned judicial commissioner had erred in admitting exh P101.

[34] On the evidence available, it is our judgment that the learned judicial commissioner erred in failing to consider the possibility of other individuals having access to the car. Had the learned judicial commissioner asked herself the right question, Her Ladyship would have found that there is a gap in the prosecution's case and that possession of the drugs had not been proved. We therefore unanimously allowed the appeal. The conviction and sentence by the High Court was set aside. The appellant was acquitted and discharged.

Appeal allowed.

Reported by Afiq Mohamad Noor